

Service Date: December 17, 1998

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER of the Commission's)	
Investigation of U S WEST Communications,)	UTILITY DIVISION
Inc.'s Compliance With Its Own Tariff and)	
Section 69-3-305, MCA, in Marketing "Custom)	DOCKET NO. D98.10.243
Choice" in Montana.)	ORDER NO. 6127

FINAL ORDER

Introduction and Background

On October 15, 1998 the Commission issued a Notice of Commission Action and Notice of Hearing, indicating that it had opened this Docket to investigate actions of U S West Communications, Inc. (U S West) relating to U S West's marketing of and charging for certain of its services. The Commission wrote in its Notice that it had "information that [U S West] is marketing in Montana a "Custom Choice" promotional package that may be (1) in violation of U S West Montana tariffs, and/or (2) in violation of Montana law on promotions." The Commission indicated in the Notice that at hearing it would explore "(1) Whether U S West's marketing of "Custom Choice" packages violated U S West's tariffs or Montana statutes; (2) If there were violations, what was the extent of the violations; and (3) If there were violations, what should be the Commission's response?"

Prior to the scheduled hearing date, Commission staff and U S West discussed whether matters in this Docket could be resolved without a hearing. U S West agreed to file a brief and affidavit addressing the three issues raised in the Notice, along with other issues raised in a Commission staff memorandum. Staff proposed that the Commission would then decide if further action in the Docket was necessary. The Commission agreed with efforts to resolve issues short of a hearing, and on October 23, 1998 issued a Notice of Commission Action Vacating Hearing and Establishing Schedule for Filing Brief and Affidavit. The brief and affidavit were due and filed on November 10, 1998.

Facts as Presented by U S West

In her affidavit Cheryl Gillespie, U S West Manager for Regulatory Relations for the State of Montana, explained facts necessary to this investigation as follows:

1. Custom Choice is a package of services for residential customers which is advertised and billed in combination with residential access line service. It was approved by the Commission on February 9, 1998, and when approved was priced in combination with residential access line service at \$29.95 per month.
2. On July 1, 1998 the price of a U S West residential access line in Montana increased by 42 cents per month. On July 10, 1998 U S West filed with the Commission to add Custom Choice to services included in Competitive Zone pricing. Competitive Zone pricing for Custom Choice was approved on July 28, 1998, but did not include the 42 cents/month access line increase. Custom Choice statewide also did not reflect the 42 cents increase.

3. On September 22, 1998 U S West became aware that its Custom Choice service package did not include the 42 cents residential access line increase. On October 8, 1998 U S West filed for approval of Custom Choice package prices that were 42 cents less than the previously approved prices, and which matched the prices actually advertised and charged.

4. From September 28 through November 7, 1998 U S West ran a regional promotion of Custom Choice that offered a \$20 rebate for subscribing to the service. U S West did not ask for or receive Commission approval for the promotion.

In addition to Ms. Gillespie's affidavit U S West stated in its brief that approximately 3000 customers in Montana signed up for the Custom Choice package between July 1 and October 15, 1998.

U S West Argument

U S West concedes that it charged incorrect rates for Custom Choice from July 1 to October 15, 1998. U S West discovered the error on September 22, 1998, but continued to market using incorrect rates after that date. U S West states that it continued to market despite the error because "[t]he advertising for Custom Choice had been established on a regional basis, the error was quite small, and in favor of the customer." U S West Brief at 3. U S West's reason for continuing to market an erroneous rate after being contacted by Commission staff was that it "assumed that the primary concern of the Commission Staff was the protection of the USWC customer." Id. U S West does not think it should be required to back bill customers to collect an additional 42 cents per month, nor does it think any customer notification is necessary.

U S West argues that section 69-3-305(5), MCA, does not control its promotion of Custom Choice. According to U S West that section requires Commission approval only for promotional pricing of basic local exchange service. “Promotional pricing refers to deviations in unit prices specified by tariff for regulated telecommunication service.” U S West Brief at 5. Promotional pricing requires the filing of a price list which shows the deviations in unit price over the period of the promotion. U S West states that its promotion of Custom Choice did not include a reduction in the residential access line tariffed rate. The \$20 rebate related to the purchase of Custom Choice, not the purchase of an access line. A rebate is not promotional pricing under § 69-3-305(5), MCA, because a rebate cannot be price listed. U S West also argues that a promotional “package” does not require Commission approval when there is no intent to deviate from the tariffed rate for local exchange service.

Discussion

The failure of a regulated utility to charge the tariffed rate for services rendered is a matter of great concern to the Commission. Not only is failure to charge the tariffed rate unlawful, but it undermines a number of the fundamental objectives of regulation, including: the establishment of rates that send the appropriate price signal, the effective recovery of a utility’s revenue requirement, the prevention of discriminatory pricing and the assurance that rates recover costs. When presented with such failure the Commission is authorized to seek fines and penalties against the offending utility in court. See §§ 69-3-209 and 69-3-206, MCA; also § 69-3-305, MCA.

The Commission is struck in this case by U S West's apparent nonchalant attitude toward its violation of tariff and Montana law over a period of some 15 weeks. U S West justifies its actions by asserting that "the error was quite small," and insinuates that the error was actually a form of customer protection. U S West Brief at 3. U S West also explains that errors occurred in its Custom Choice Montana program because U S West advertising is done on a regional basis and managed at the corporate level. Affidavit of Cheryl Gillespie, p. 2.

The fact that the error was small, and was an undercharge, does not in any sense excuse violating the tariff in the first instance, nor does it excuse continuing to advertise and charge the erroneous rate after discovering the error. As U S West knows, rates are set after considering numerous and complex factors. If U S West believes that reducing its charge for any regulated telecommunications service in Montana is appropriate, it should file such a reduction with the Commission and make its case; but it should refrain from violating the law, and then effectively contending that the violation was in the public interest.

With respect to the marketing of Custom Choice, it is irrelevant whether the development and placement of U S West advertising is done at the corporate, regional or state level. It is the expectation of this Commission that regulated companies with regional operations establish appropriate policies and procedures to ensure adequate communication between corporate and state management. It is not acceptable that a regulated utility knowingly market services under incorrect rates, regardless of where advertising is developed.

U S West advertised the Custom Choice package under incorrect rates on a statewide basis. This included marketing and sales in flexible pricing areas of Montana where the Commission has determined the existence of competitive local exchange carriers. While the Commission is concerned whenever a regulated utility fails to charge the tariffed rate for services rendered, this concern is heightened in a competitive market. Failure to charge tariffed rates adversely affects all carriers operating in the competitive environment. Although U S West's failure to charge according to its tariff may have initially been inadvertent, continuing to charge incorrect rates after knowledge of the error gives the appearance of anticompetitive behavior, or at least a lack of good faith effort to follow the law.

The Commission finds that further formal action on the U S West violations, either administrative or judicial, is not warranted. The Commission reaches this conclusion because the violations were apparently inadvertent, and a result of miscommunication between U S West's Montana offices and its corporate headquarters. However, while inadvertence and bad corporate communication justifies the Commission's decision not to proceed with formal action in this case, it is not a valid defense to violations of law, and it may not be sufficient reason for the Commission to restrain from formal action in the future. In the future when U S West is made aware of tariff violations it should immediately take steps to correct the violations, it should cooperate fully and completely with Commission staff, and it should not retreat into a pose of self justification based on its conclusion that the violations were minor or that they benefited customers.

U S West recommends that the Commission issue a nunc pro tunc order amending the Custom Choice tariffs retroactive to July 1, 1998. “Nunc pro tunc entry is an entry made now of something actually previously done to have effect of former date; office being not to supply omitted action, but to supply omission in record of action really had but omitted through inadvertence or mistake.” Black’s Law Dictionary, 5th Edition. Nunc pro tunc is not appropriate in this instance because nothing was “actually previously done” by the Commission that needs to be corrected. The act omitted should have been performed by U S West, not the Commission. The Commission will not attempt to validate retroactively a violation of law.

Regarding promotions, the relevant part of Section 69-3-305(5)(a), MCA, reads as follows:

(5)(a) [1] A provider of regulated telecommunications service may offer, for a limited period of time, rebates, price reductions, or waivers of charges in conjunction with promotions, market trials, or other sales-related activities that are common business practices. [2] Promotional pricing for services other than basic local exchange access to end users does not require advance approval of the commission. [3] Informational price lists must be filed with the commission on or before the date that the promotion begins. [4] Promotional offerings for basic local exchange access to end users and packaged services that include basic local exchange access to end users require advance approval of the commission.

In the Commission’s view the words “promotional” and “promotion” in the second, third and fourth sentences must be read in conjunction with the words or phrases “rebates,” “price reductions,” “waivers of charges,” “promotions,” “market trials,” and “other sales-related activities” in the first sentence. In other words, “promotional pricing” in the second sentence refers to pricing for “rebates, price reductions, or waivers of charges in conjunction with promotions, market trials, or other sales-related activities.” The word “promotion” in the third sentence and “promotional offerings” in the fourth sentence also refers to each concept in the

first sentence. Pursuant to the fourth sentence the Commission must approve a promotion for local exchange access, or a promotion of a package of services that includes local exchange access. Pursuant to the third sentence, all promotions require the filing of an informational price list on or before the date the promotion begins.

In this case U S West offered a \$20.00 one-time rebate to customers who purchased a package of services that included basic local exchange service. The Commission finds that such a rebate is clearly a promotion under § 69-3-305(5)(a), MCA, and subject to approval of the Commission under that section. U S West contends that § 69-3-305(5)(a), MCA, distinguishes between rebates, price reductions and waivers of charges. The Commission disagrees, and finds the statute merely lists the foregoing as examples of kinds of promotions. Some form of notice and description of each promotion that requires approval – including rebates – must be provided and approved before the promotion begins. Promotions that don't require approval – including rebates – require the filing of an informational price list, or some form of appropriate notice.

Conclusions of Law

1. U S WEST Communications, Inc. is a public utility under the jurisdiction of the Montana Public Service Commission. § 69-3-101, MCA.
2. The charges made for regulated services provided by U S West must be consistent with printed schedules (tariffs) on file with the Commission. § 69-3-305, MCA.
3. Prior to making promotional offerings of certain of its services U S West must have the approval of the Commission. § 69-3-305(5)(a), MCA.
4. Prior to making any promotional offering U S West must file with the Commission an information price list or other appropriate notice. § 69-3-305(5)(a), MCA.

5. On the facts of this Docket U S West failed to charge according to tariff, in violation of Montana law.

6. On the fact of this Docket U S West failed to secure approval of the Commission prior to promoting its Custom Choice services, in violation of Montana law.

Order

The Commission finds that U S West may not recover in future rates the aggregate amount it undercharged Montana customers for Custom Choice service.

The Commission finds that the unlawful actions taken by U S West identified in this Order do not require further action by the Commission.

DONE AND DATED this 15th day of December, 1998 by a vote of 3-1.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman

NANCY MCCAFFREE, Vice Chair, dissenting
Dissent attached

DANNY OBERG, Commissioner

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.

December 15, 1998

Dissent of Commissioner Nancy McCaffree
Docket D98.10.243
Order No. 6127

This docket was opened to investigate a tariff violation by US West Communications, Inc., regarding marketing of a product (Custom Choice) in northeast Montana.

When the tariff violation was brought to the attention of US West they did file the proper tariff with this office. However even after this, the company had a representative placing doorknob advertising on homes in the area. The explanation used is that these decisions are made in their Denver office. Ignorance has never been a good excuse. The order does have some strong language addressing the violation with which I agree. The order just does not go far enough.

My dissent is based on the firm belief that US West should repay the total amount according to the filed tariff. This repayment should not be borne by the ratepayer. There is not a great deal of money at issue here. The issue is a known violation of a filed tariff.

Nancy McCaffree
Commissioner
District 2